

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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97284

FILE: B-183155

DATE: May 20, 1975

MATTER OF: Western Waterproofing Company, Inc.

DIGEST:

1. Where purpose of invitation's data submission requirement is to enable procuring activity to evaluate bid to determine whether materials proposed by bidders for use in performance of contract conform with Government's stated technical requirements, failure to submit such data with bid is proper cause for rejection inasmuch as requirement relates to responsiveness of bid and not responsibility of bidder.
2. Allegation that bidder who proposes to use composite stone for restoration work is not required to submit test data in accordance with data submission clause calling for such data to show compliance of "synthetic stone" to specified test criteria is without merit, since specifications required bidders to employ only those materials qualified under test criteria set forth in data submission clause and agency points out that there is no distinction between "composite" and "synthetic" stone.
3. Bidder's allegation that specifications were restrictive of competition, which was received by GAO more than 5 weeks after procuring activity denied bidder's request for extension of bid opening, is untimely and not for consideration under Interim Bid Protest Procedures and Standards, 4 C. F. R. § 20.2(a).

Invitation for bids (IFB) No. BM-OM-75-06 was issued on December 10, 1974, by the Bureau of the Mint (BOM), Department of the Treasury, for the restoration of the exterior of the Old Mint Building, San Francisco, California. The IFB's "Special Instructions to Bidder" read in pertinent part:

"In order for a bid to qualify as responsive to the Invitation for Bid, the following information must be submitted with the bid:

"A. Data, certified by a recognized independent testing laboratory, to demonstrate that the synthetic stone (matrix, not individual components thereof) proposed for use in cornice restoration and the synthetic and/or natural stone proposed for use in other stone patching and replacements is in compliance with the following criteria * * *"

There then followed a listing of six technical criteria for the proposed restoration materials and the applicable ASTM (American Society of Testing and Material) tests to be used in determining compliance therewith. Furthermore, the solicitation at section 0440, paragraph 3.1, entitled "Materials", required that regardless of which of the two restoration systems anticipated to qualify under the Government criteria for performing the proposed contract was chosen, the prospective contractor "shall employ only those materials which have qualified under test criteria set forth in the Special Instructions to Bidder * * *." Seven bids were received and opened on the scheduled opening date, January 30, 1975. The low bid was submitted by Western Waterproofing Company, Inc. (Western), and the next low bid was submitted by Charles O. Jones Company, Inc. (Jones). Award has been withheld pending our decision.

By letter of that same day, Jones protested to BOM against the award of the contract to the apparent low bidder, alleging that Western did not submit with its bid the technical data required of all bidders as a condition of bid responsiveness by the invitation's "Special Instructions to Bidder." A virtually identical protest was filed by Jones with our Office on February 4, 1975.

In its report of February 19, 1975, BOM recommended that award be made to Jones on the basis that Western's bid was non-responsive to the invitation's data submission requirement since the data submitted by Western "was incomplete, was not certified by a recognized independent testing laboratory, and was not based on tests of the specific synthetic stone proposed for use."

While Western takes issue with BOM's determination regarding the inadequacy and incompleteness of its data, the main thrust of the bidder's response to the agency's position is its contention that a reading of the data requirement in the context of the entire solicitation, "leads to the inescapable conclusion that the data requested by the Special Instructions to Bidder pertains only to bidder responsibility." (Emphasis added.) Accordingly, Western contends

that since the information required by the solicitation's paragraph and relied on by BOM to justify rejection of its bid dealt with the capacity or ability (responsibility) of the bidder to perform the proposed contract, the failure by Western to submit the data did not justify rejection of its bid as nonresponsive inasmuch as bidder responsibility may be determined on the basis of information submitted after the bid opening. In support of its contention, Western cited several of our previous decisions.

For the reasons stated below Western's protest is denied.

Western correctly points out that our Office has consistently held that where the requirement for the submission of data is for the purpose of determining the capacity or responsibility of a bidder rather than whether the property or services offered conform to the Government's needs as stated in the solicitation, the failure of the bidder to submit data in accordance with the solicitation's data submission requirement is not fatal to the consideration of its bid, inasmuch as a bidder's capacity or responsibility may be determined on the basis of information submitted after the bid opening, Matter of Starr Electrical Company, B-181042, August 2, 1974. However, it is our view that the facts of the instant protest present just the opposite situation.

The record clearly indicates that the purpose of the IFB's requirement for the submission of data was to provide BOM with a base of information to make a determination of precisely what the respective bidders proposed in the way of restoration materials, and would be bound to furnish, if awarded the contract. The failure of a bidder to comply fully with the data requirement would adversely affect the ability of the procuring activity to evaluate its bid and determine whether the restoration materials proposed to be furnished in the performance of the required services conformed with the Government's needs as set forth in the solicitation's technical criteria. In this regard, BOM states that the data submission requirement was established for the explicit purpose of requiring bidders to provide reasonable evidence, in the form of certified test results, indicating the physical characteristics and construction of their proposed materials, that the required stone replacements and repairs would be performed with such materials and would be of acceptable quality and in close physical compatibility with the existing building stone. Thus, the data, representing the results of the ASTM tests performed on the

materials, was not intended to and did not in any way, reflect on the bidder's capacity or ability to perform the proposed contract, but rather was intended to demonstrate to BOM that the proposed restoration materials qualified under the IFB's technical criteria for use in the performance of the proposed contract. The bidder's ability and technical know-how to perform the restoration services employing materials qualified under the IFB's technical criteria is a matter distinct from the procuring activity's determination regarding the compliance of those proposed materials with the stated technical requirements. Data of the nature required by paragraph A is relevant to an evaluation of the materials proposed for use and, in our opinion, would not be useful to BOM in its determination of the bidder's responsibility. Since it is fundamental that responsiveness is to be determined at bid opening and that a contracting officer cannot rely on information supplied by a bidder after bids have been opened (Waukesha Motor Company, B-178494(1), June 18, 1974), the rejection of Western's bid is required under the circumstances of the instant procurement.

We have reviewed the cases cited by counsel for Western and found they are distinguishable from the instant case. Generally, these cases involved requirements for information relevant to the bidder's ability to perform, such as a list of equipment to be used in performance of the contract (D & D Aero Spraying, Inc., B-182070, November 26, 1974), a test report to determine whether the bidder was able to furnish an item meeting the Government's needs (B-174467, February 4, 1972), or the bidder's experience in producing the item being procured (B-151580, June 4, 1963). Finally, in B-178722, October 10, 1973, cited by Western as supporting its position, our Office disagreed with the agency's determination that a bid was non-responsive to the solicitation's requirement for a viral serology test report on the basis that the specifications were ambiguous and in fact did not require the submission of such a report as a condition of responsiveness. Therefore, we believe that B-178722 is distinguishable from the instant situation.

Furthermore, counsel for Western alleges that the invitation's data submission requirement upon which BOM relied in rejecting its client's bid did not apply to Western since its bid was based on the use of composite stone. Counsel contends that this requirement related solely to those bidders proposing to use synthetic stone in the performance of the contract and, therefore, Western was not required to submit qualifying data with its bid as a condition of responsiveness. While paragraph A of "Special Instructions to

Bidder" required bidders to submit data demonstrating compliance of "synthetic" stone with specified test criteria, we do not think it is reasonable to read the requirement as not applicable to a bidder proposing to furnish "composite" stone. Furthermore, BOM points out that there is no distinction between "composite" stone and "synthetic" stone. In this connection, we note that the solicitation at section 0440, paragraph 3.1, entitled "Materials", requires that prospective contractors employ only those materials qualified under the test criteria set forth in the solicitation's data submission clause. Therefore, we believe the protester's contention in this regard is without merit.

Regarding counsel's letter of March 7, 1975, received by our Office on March 13, 1975, which renewed Western's contention that the IFB's specifications were "unduly restrictive of competition," a review of the record indicates that this contention was initially raised with BOM in Western's January 23, 1975, letter requesting a 3-week extension of bid opening in order to enable the firm to obtain the required data. On January 28, 1975, BOM notified Western that the IFB's requirements, including the time for bid opening, would not be changed. Therefore, Western's failure to raise this issue within 5 days of being notified by BOM that the requirement for submission of data would not be changed renders this portion of its protest untimely under our Interim Bid Protest Procedures and Standards (4 C.F.R. 20.2(a)), which requires in pertinent part that protests initially filed with the contracting agency must be filed with our Office within 5 days of notification of adverse agency action.

Finally, Western has stressed the fact that its bid was 20 percent lower than Jones'. In this connection, our Office consistently has held that a low price will not be determinative of an award where the bid is otherwise nonresponsive to the Government's requirements. 52 Comp. Gen. 604, 607 (1973).

Accordingly, we find no legal basis to question BOM's determination to reject Western's bid and award the contract to Jones.


Deputy Comptroller General
of the United States